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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942

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No.

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ERNEST NEWTON KALB,

*Petitioner,*

vs.

YELLOW MANUFACTURING ACCEPTANCE  
CORPORATION,

*Respondent.*

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**PETITION**

For a Writ of Certiorari to the United States Circuit Court  
of Appeals for the Seventh Circuit.

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(The brief in support of this petition begins at page 15.)

**Note:** All emphasis in this petition and in the accompanying brief is supplied except when otherwise stated.

Following the last page of the petition (page 14), and preceding the brief, there is inserted Section 75 of the Bankruptcy Act, which is involved in this cause.

*To the Honorable Harlan F. Stone, Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

## I.

### **A Summary Statement of the Matter Involved.**

#### **1. The Statute Involved.**

There is involved Section 75 of the Bankruptcy Act, 11 U.S.C. 203, which is the farmer debtor law. A copy of it is inserted following page 14, the last page of this petition.

The proceeding in the bankruptcy court below never passed beyond Section 75 (a) to (r) which relates to composition and extension.

The portion of Section 75 most particularly involved is Section 75 (e), (n), (o), and (p).

There is also involved the Fifth Amendment to the Constitution.

#### **2. The Decisions of the Courts Below.**

The District Court rendered no opinion. The final order of the District Court issued without notice and without hearing, was entered October 20, 1941. R. 17 to 18.

The opinion of the Circuit Court of Appeals for the Seventh Circuit which affirmed the District Court is reported as *Kalb v. Yellow Manufacturing Acceptance Corporation*, C.C.A. 7, 127 Fed. (2d) 511, decided April 20, 1942. R. 30 to 33. The final order of the Appellate Court and the denial of the petition for rehearing are at R. 34 and 35.

### 3. The Procedure in the District Court.

While the farmer debtor's petition under Section 75 was pending on August 5, 1941, there regularly came on for hearing in the District Court a matter relating to real estate, involving the farmer debtor (petitioner here) and certain real estate mortgage holders. Neither the real estate nor the holders of the real estate mortgage are involved here. At the same session of the court and after the real estate matter was heard counsel for the Yellow Manufacturing Acceptance Corporation (respondent here), asked the judge for an order requiring the petitioner to surrender certain trucks which were subject to its chattel mortgage. A petition for such an order had, without notice or knowledge on the part of the petitioner been previously filed with the clerk of the court. No notice that this other petition was to be presented or heard had been given. It had no connection with the matter relating to real estate.

Counsel who had represented the petitioner in the real estate matter was asked by the judge whether he had anything to say on this second matter relating to the chattel security thus presented by the respondent. He answered that neither the farmer debtor (the petitioner here) nor his counsel had any notice or knowledge that the second motion had been filed or that it was to be then presented or heard and that he could not undertake to subject his client to the jurisdiction of the court concerning it or to make any further statement. So far as is known to petitioner and his counsel, nothing more occurred in relation to the subject until on October 20, 1941, when the order of that date was entered. R. 17 to 18. The first the petitioner and his counsel knew of the order was on October 23, 1941 when a copy was served upon the petitioner and another copy was received in the mail by his counsel. On October

30, 1941, the petitioner filed in the District Court his verified "Exceptions and Objections of Farmer Debtor to Order entered October 20, 1941" which more fully relates the facts here stated. R. 18 to 20. The petitioner gave no supersedeas bond and his trucks still remain in his possession. Notice of appeal was filed October 31, 1941. R. 21.

## II.

### Statement of the Basis of the Jurisdiction of This Court.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code, 28 U.S.C. 347(a).

The petitioner has complied with Section 8(a) of the Act of February 13, 1925; 28 U.S.C. 350. The judgment of the Appellate Court below (R. 34) became final on June 9, 1942, when his petition for rehearing was denied. R. 35. This petition for certiorari is filed within three months thereafter.

The mandate of the Appellate Court has been stayed to August 31, 1942, and this petition for certiorari is filed prior thereto.<sup>1</sup>

## III.

### The Questions Presented.

The questions presented are:

#### 1.

Did the failure by the bankruptcy court to observe the procedure prescribed in Section 75 (o) cause the order to be unlawful?

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<sup>1</sup> After the manuscript of this petition and brief had been sent to the printer, the mandate (which, as stated above, had been stayed by order of the appellate court to August 31, 1942, pending application for certiorari, and which stay order remains unrevoked so far as is known to petitioner) was issued to the District Court on August 21 by order of that court. (Ten days before the expiration of the stay as originally ordered.) The petitioner on August 21, 1942, forwarded to this court an application for stay of execution in the District Court, which was granted.

2.

Could the bankruptcy court lawfully issue the order of October 20 when the provisions of Section 75(n) and of Section 75(p) require that all of the farmer debtor's property shall be under the sole jurisdiction and control of the bankruptcy court and be subject to the payment of his debts in the manner provided in Section 75 and that said provisions apply to all proceedings in any court, to all officials, to all creditors, and to all of the farmer debtor's property?

3.

Did the order which required the farmer debtor to surrender his property unconditionally and deliver it to the mortgage holder free of all control and administration by the bankruptcy court violate the provision of Section 75(e) requiring the bankruptcy court to exercise control over the farmer debtor?

4.

Did the order which required the farmer debtor to surrender his property unconditionally and deliver it to the mortgage holder free of all control and administration by the bankruptcy court violate the general provisions and purpose of Section 75?

5.

May a bankruptcy court in a farmer debtor proceeding under Section 75 order the farmer debtor to deliver directly and unconditionally his mortgaged chattels to the holder of a mortgage lien thereon despite the provisions of Section 75(n), (o), and (p)?

6.

Regardless of the provisions of Section 75, did the manner of the issuance of the order, without notice of hearing, without hearing and without consent, render the order void, when the petitioner did not know that any application for the order had been filed or was to be heard?

## IV.

**Reasons Relied Upon for Allowance of a Writ of Certiorari.**

The petitioner respectfully represents that special and important reasons necessitate the granting of a review on writ of certiorari to the appellate court below.

The interpretation of a statute of the United States is involved, namely Section 75 of the Bankruptcy Act, 11 U.S.C. 203 relating to farmer debtors.

## 1.

In disregard of the provision of Section 75(n) reposing exclusive jurisdiction in the bankruptcy court over all property of a farmer debtor who has filed a petition under Section 75, the appellate court below held that the bankruptcy court had discretion to order the farmer debtor to surrender his mortgage property and deliver it to the mortgage holder without the reservation of any jurisdiction or control in the bankruptcy court.

## 2.

Without observing the mandatory provision of Section 75(o), the bankruptcy court below, sustained by the appellate court, ordered the farmer debtor to surrender and deliver unconditionally to the mortgage holder certain chattel security which is a part of the farmer debtor's estate being administered under Section 75. Said Section 75(o) requires the following procedure before a court may permit a mortgage holder to proceed against security involved in a farmer debtor proceeding: (1) A petition made to the judge, (2) reference to the conciliation commissioner, (3) hearing by the conciliation commissioner, (4) report to the



judge by the conciliation commissioner, (5) an order by the judge granting the petition. The final order of October 20, 1941, R. 17 to 18, was issued without observance of the mandatory preliminaries.

## 3.

The bankruptcy court below, sustained by the appellate court, disregarded the mandatory provisions of Section 75(p) that the prohibitions of said Section 75(o) shall apply to all judicial or official proceedings in any court, or under the direction of any official, and shall apply to all creditors and to all of the property of the farmer debtor, and that all of his property shall be under the sole jurisdiction and control of the bankruptcy court and subject to the payment of his creditors under the provisions of Section 75. The order required the farmer debtor to "surrender and deliver" absolutely the chattel security to the mortgage holder free from any restriction or control whatsoever by the court or by the owner.

## 4.

The appellate court below held that the provision of Section 75(e) providing that "the court shall exercise control over the property of the farmer debtor" gave the bankruptcy court discretionary power to abandon and surrender all control and administration over such property if it should be subject to mortgage.

## 5.

The appellate court below held, in violation of the prescriptions of Section 75(e), (n), (o) and (p), that the bankruptcy court had a discretion whereby it could compel the farmer debtor to surrender all possession and control over his mortgaged property and surrender it uncon-

ditionally to the mortgage holder beyond the control of the court, whereas said Section 75(e), (n), (o), and (p), require the bankruptcy court to retain exclusive jurisdiction and control over the farmer debtor's property and to administer it for the payment of the farmer debtor's creditors as provided in Section 75.

## 6.

There is involved the interpretation of Section 75 of the Bankruptcy Act, 11 U.S.C. 203 generally, that is, whether the order conflicts with the general purpose of the statute.

The decision below is in conflict with the decisions of this court which have interpreted the provisions of Section 75.

## 7.

*Kalb v. Feuerstein* (1940), 308 U. S. 433, held that a state court has no power to proceed when a farmer debtor proceeding is pending in a bankruptcy court under Section 75. Because Section 75(p) makes the provisions of Section 75 applicable to all officials, to all courts, to all property, and to all creditors and requires the farmer debtor's property to remain subject to the sole jurisdiction and control of the bankruptcy court and subject to the payment of all debts as provided for in Section 75, said decision of this court is equally applicable to this order.

## 8.

The decision of the appellate court and the order of the bankruptcy court below are also in conflict with the decision of this court in *Adair v. Bank* (1938), 303 U. S. 350, which held that a bankruptcy court may not surrender, or require a farmer debtor to surrender, to a secured creditor the proceeds, of the use of property mortgaged to such secured creditor. The said order and decision below would

take from the farmer debtor all proceeds from the use of his property by compelling him to surrender such property unconditionally to the mortgage holder and out of the control and jurisdiction of the bankruptcy court.

## 9.

The decision of the appellate court and the order of the bankruptcy court below are also in conflict with the decisions of this court in *John Hancock v. Bartels* (1939), 308 U. S. 180; in *Gray v. Union Joint Stock Land Bank* (1939), 308 U. S. 523; and in *Morrison v. Federal Land Bank* (1939), 308 U. S. 524, which held that a bankruptcy court may not terminate its jurisdiction, control and administration over a farmer debtor's mortgaged property and may not surrender its jurisdiction and control of such property to a secured creditor who holds a mortgage lien thereon.

## 10.

Even if it could be assumed, and it can not be, that, as held by the appellate court below, the farmer debtor agreed with his secured creditor to make payments directly to the secured creditor, or to the conciliation commissioner to be held by such conciliation commissioner *ex cathedra* in a manner not authorized by the statute, he was bound to make such payments under penalty of losing his property and surrendering it from the jurisdiction and control of the bankruptcy court, then it is in conflict with the decision of this court in *Borchard v. California Bank* (1940), 310 U. S. 311, which held that even though payments were made by the farmer debtors directly to the mortgage holder pursuant to agreements between them and in compliance with orders of the bankruptcy court, such payments and such orders were violative of the mandatory and orderly procedure prescribed by Section 75.

## 11.

The decision of the appellate court and the order of the bankruptcy court below requiring the farmer debtor to surrender his property to the holder of a mortgage lien against it and thus remove it from the control and jurisdiction of the court are in conflict with the decision of this court in *Wright v. Logan* (1942), 315 U. S. 139, holding that a farmer debtor may not be deprived of the right to have his property administered under Section 75 by being compelled to surrender it to the holder of a mortgage lien against it.

## 12.

The said decision in holding that any general or statutory law outside of Section 75 would make the order complained of lawful is in conflict with the repeated decisions of this court that the provisions of Section 75 are mandatory and controlling over any other provision of law. Particularly they conflict with the decision of this court in *Benitez v. Bank* (1941), 313 U. S. 370, and in general they conflict with the tenor of the decisions of this court in:

*Wright v. Vinton* (1937), 300 U. S. 440;

*First National Bank v. Beach* (1937), 301 U. S. 435;

*Adair v. Bank* (1938), 303 U. S. 350;

*Wright v. Union Central* (1938), 304 U. S. 502;

*John Hancock v. Bartels* (1939), 308 U. S. 180;

*Gray v. Union* (1939), 398 U. S. 523;

*Morrison v. Federal* (1939), 308 U. S. 524;

*Kalb v. Feuerstein* (1940), 308 U. S. 433;

*Borchard v. California Bank* (1940), 310 U. S. 311;

*Wright v. Union Central* (1940), 311 U. S. 273;

*Wright v. Logan* (1942), 315 U. S. 139.

The decision of the appellate court and the order of the bankruptcy court below conflict with the uniform course of the decisions of this court holding that a bankruptcy court may not surrender its jurisdiction in bankruptcy but must administer the property coming within its jurisdiction.

## 13.

*U. S. F. & G. v. Bray* (1912), 225 U. S. 305, Page 218:

The bankruptcy court "was not at liberty to surrender its exclusive control over matters of administration" . . .

In this case the bankruptcy court by its express order granted leave to litigate in a state court and although no review of that order was ever sought it was declared void.

*Isaacs v. Hobbs* (1931), 282 U. S. 734. Page 739:

"The jurisdiction in bankruptcy is made exclusive in the interest of due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of the property which has come into its possession. Indeed a court of bankruptcy itself is powerless to surrender under its control of the administration of the estate."

*Gross v. Irving* (1933), 289 U. S. 342. Page 344:

"Such jurisdiction having attached, control of the administration of the estate can not be surrendered even by the court itself."

*Thompson v. Magnolia* (1940), 309 U. S. 478. Page 630:

"A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession."

## 14.

The decision of the appellate court and the order of the bankruptcy court are in conflict with the decision of other federal circuits.

The Second Circuit:

*In re Mahaffey*, C.C.A. 2 (1942), 129 Fed. (2d) 292. A bankruptcy court may not abdicate its statutory oversight in a farmer debtor proceeding.

The Eighth Circuit:

*Naylor v. Cantley*, C.C.A. 8 (1938), 96 Fed. (2d) 761. A real estate foreclosure action was pending in the United States District Court when the defendant in foreclosure filed on the bankruptcy side of the same court his petition as a farmer debtor. The Court proceeded with the sale in foreclosure. The appellate court held that ". . . since that [bankruptcy] court could not surrender its jurisdiction to any other court, it was incumbent upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75" . . . That is, a District Court may not surrender the special jurisdiction under its bankruptcy power over to its jurisdiction in foreclosure previously acquired.

*Chicago, etc. R. R. v. City of Owatonna*, C.C.A. 8 (1941), 120 Fed. (2d) 226. Relative to an appeal under Section 77 relating to a railroad debtor proceeding, it was held that "there is no power in the officers of a bankruptcy court to affect this exclusive [bankruptcy] jurisdiction of that court, whether by waiver, estoppel or laches." . . .

## 15.

No decision has been found or is recollected in which a bankruptcy court has ordered a farmer debtor to surrender his chattel directly to the holder of a mortgage lien on it. The order in question appears to be without precedent.

## 16.

The decision of the appellate court below in holding that an order issued upon an application therefor, without any notice that said application would be heard, is a valid and binding order and within the power of the bankruptcy court to issue it, is in conflict with the decisions of this court in the following cases:

*Voorhees v. Jackson* (1836), 35 U. S. (10 Pet.), 449, 474;

*Galpin v. Page* (1874), 85 U. S. (18 Wall.) 350; 368;

*Windsor v. McVeigh* (1876), 93 U. S. 274;

*Holden v. Hardy* (1898), 169 U. S. 366, 389;

*Ballard v. Hunter* (1907), 204 U. S. 241;

*Twining v. New Jersey* (1908), 211 U. S. 78, 102;

*Coe v. Armour* (1917), 237 U. S. 413, 426;

*Morgan v. United States* (1938), 304 U. S. 1, 18.

Said decision is likewise in conflict with other Circuit Courts of Appeals decisions on the same subject, namely:

*Sheets v. Livy*, C.C.A. 4 (1938), 97 Fed. (2d) 674;

*In re Rosser*, C.C.A. 8 (1900), 101 Fed. 106;

*Boyd v. Glucklich*, C.C.A. 8 (1902), 116 Fed. 131;

*In re Frank*, C.C.A. 8 (1910), 182 Fed. 794.

The last three cited cases hold that a referee in regular bankruptcy may not issue an order granting a motion presented at a creditors' meeting without any notice thereof except the general notice that a creditors' meeting is to be held. Such an order was held to be void.

Said decision of the appellate court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the lower district court as to call for an exercise of its power of supervision by this court. Said decision has sanctioned the violation of due process of law in a proceeding pending in the bankruptcy court in that at the time set for hearing of a matter involving a certain creditor another creditor, respondent here, presented a motion for the issuance of an order involving different property without any notice whatever having been given to the farmer debtor or his counsel that such a motion would be presented or heard or that such an order would be considered or issued.

Said order was issued in violation of the Fifth Amendment to the Constitution of the United States which prohibits the deprivation of property without due process of law.

Wherefore your petitioner prays that a writ of certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit directing it to certify and send to this court a transcript of the record and proceedings in this cause so that it may be received and determined by this court. He further prays for all other relief that may be proper.

Respectfully submitted,

ELMER McCLAIN,

Lima, Ohio,

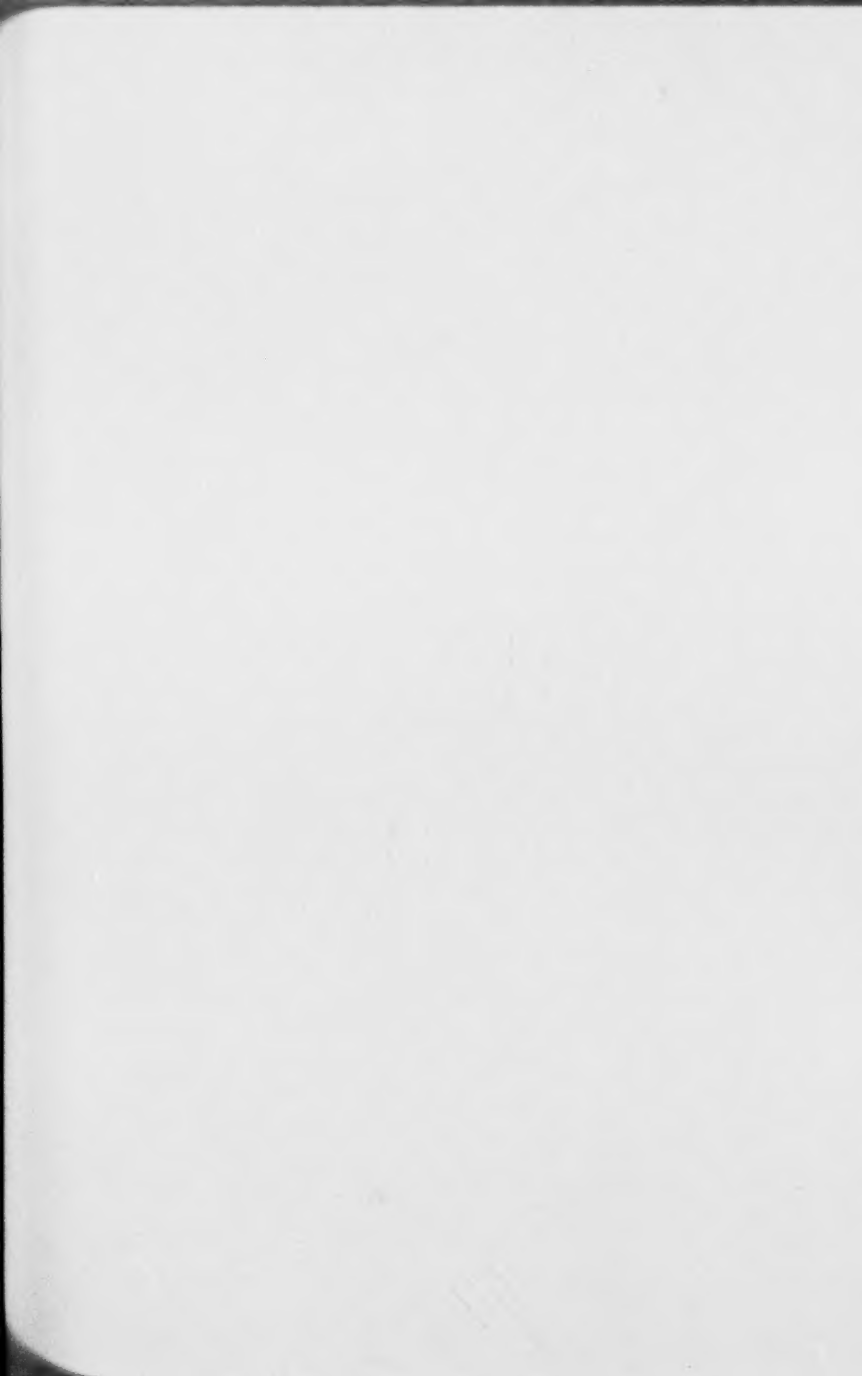
*Counsel for Ernest Newton Kalb,  
Farmer Debtor Petitioner.*

Lima, Ohio

August 19, 1942.

**Note:** An official print of Section 75 of the Bankruptcy Act is inserted following this page.





# AGRICULTURAL COMPOSITIONS AND EXTENSIONS

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## SECTION 75 OF THE BANKRUPTCY ACT AS AMENDED BY—

PUBLIC 296 OF THE SEVENTY-THIRD CONGRESS  
PUBLIC 60 OF THE SEVENTY-FOURTH CONGRESS  
PUBLIC 384 OF THE SEVENTY-FOURTH CONGRESS  
PUBLIC 439 OF THE SEVENTY-FIFTH CONGRESS  
PUBLIC 696 OF THE SEVENTY-FIFTH CONGRESS  
PUBLIC 423 OF THE SEVENTY-SIXTH CONGRESS

TITLE 11, SECTION 203, UNITED STATES CODE

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(Reprint of Senate Document No. 55, 75th Congress)



PRESENTED BY MR. NYE  
FOR MR. FRAZIER

JUNE 10 (legislative day, MAY 28), 1940.—Ordered to be printed  
with certain corrections

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UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1940

# AGRICULTURAL COMPOSITIONS AND EXTENSION

SECTION II OF THE BUREAU OF AGRICULTURE  
—

THE BUREAU OF AGRICULTURE, U. S. DEPARTMENT OF AGRICULTURE, has the honor to acknowledge the receipt of the following report from the Director of the Bureau of Agricultural Extension, U. S. DEPARTMENT OF AGRICULTURE, for the year ending June 30, 1875.

REPORT OF THE DIRECTOR OF THE BUREAU OF AGRICULTURAL EXTENSION, U. S. DEPARTMENT OF AGRICULTURE, FOR THE YEAR ENDING JUNE 30, 1875.

WASHINGTON: GOVERNMENT PRINTING OFFICE, 1875.



RECEIVED BY THE BUREAU  
JAN 10 1876

For sale by the Government Printing Office, Washington, D. C.

Price, 10 CENTS  
Per copy, 10 CENTS

# AGRICULTURAL COMPOSITIONS AND EXTENSIONS

[PUBLIC—No. 420—72D CONGRESS]

[H. R. 14359]

## AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," as amended by the Acts of February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, and February 11, 1932, be, and it is hereby, amended by adding thereto a new chapter to read as follows:

## "CHAPTER VIII

[As amended by the 73rd, 74th, 75th, and 76th Congresses]

### "PROVISIONS FOR THE RELIEF OF DEBTORS

"SEC. 75. AGRICULTURAL COMPOSITIONS AND EXTENSIONS.—(a) Within thirty days after June 7, 1934, every court of bankruptcy of which the jurisdiction or territory includes a county or counties having an agricultural population (according to the last available United States census) of five hundred or more farmers shall appoint one or more referees to be known as 'conciliation commissioners', one such conciliation commissioner to be appointed for each county having an agricultural population of five hundred or more farmers according to said census: *Provided further,* That where any county in any such district contains a smaller number of farmers according to said census, for the purposes of this paragraph such county shall be included with one or more adjacent counties where the population of the counties so combined includes five hundred or more farmers, according to said census. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office for one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee<sup>1</sup> and in addition is a resident

<sup>1</sup>Sec. 35 of Chandler Act, Public, 696, of the 75th Cong., requires all new referees to be attorneys.

of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

"(b) Upon filing of any petition by a farmer under this section there shall be paid a fee of \$10 to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, a fee of \$25 for each case submitted to him, ~~and when docketed, to be paid out of the Treasury to be paid out of the Treasury when the conciliation commissioner completes the duties assigned to him by the court.~~ A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of \$5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment, and assistance furnished him by other Federal officials, or by any State, county, or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived.

"(c) ~~At any time within 5 years after March 3, 1933,~~ prior to March 4, 1944, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

"(d) After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

"(e) The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

"(f) There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer's estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any supplementary inventory filed by a committee of the creditors.

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims.

"(h) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

"(i) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

"(j) The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer's affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided*, That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24,

of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

"(k) Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured.

"(l) Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided,* That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

"(m) The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

"(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirma-

tion of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

"(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

"(r) For the purposes of this section, and section 4 (b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy



farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and

earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of

this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

*"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act: as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection(s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges.*

*"(5) This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Section, as well as to future cases. All cases under this Section that have been dismissed by any conciliation commissioner, referee, or Federal Court because such Court erroneously assumed or held that subsection(s) of section 75 of this Act was unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.*

*"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceeded to liquidate the estate.*





## **BRIEF**

### **In Support of the Foregoing Petition for a Writ of Certiorari.**

A Government reprint of Section 75 precedes this brief.

#### **I.**

##### **Index.**

The index precedes the Petition for Certiorari.

#### **II.**

##### **The Report of the Opinion Below.**

The opinion of the appellate court below is reported as *Kalb v. Yellow Manufacturing Acceptance Corporation*, 127 Fed. (2d) 511, decided April 20, 1942. R. 30 to 33.

The District Court below issued no opinion. Its final order is at R. 17 and 18, beginning at folio 21.

#### **III.**

##### **The Grounds on Which the Jurisdiction of This Court Is Invoked.**

The grounds for invoking the jurisdiction of this court are stated in the Petition at page 2 and at pages 6 to 14.

#### **IV.**

##### **A Concise Statement of the Case.**

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##### **Proceedings Preliminary to the Origin of the Issues Here Raised.**

The petitioner filed his farmer debtor petition and schedules under Section 75 and listed the secured debt and the

mortgaged trucks which are involved here. R. 5. See Schedule A-2 at the bottom of R. 7 and the top of R. 8, and Schedule B-2 G at R. 10.

On June 25, 1941, he filed his proposal to creditors with the conciliation commissioner. R. 13 to 15.<sup>2</sup>

On July 1, 1941, the first creditors' meeting was held before the conciliation commissioner. R. 4, folio 5, entry of July 1, 1941.

At this creditors' meeting, the real estate mortgage holders filed a petition to strike the mortgaged real estate from the schedules and for leave to proceed with foreclosure. (This petition was later referred to the Judge of the district court where it was denied. On appeal the district court affirmed. *Feuerstein v. Kalb*, C.C.A. 7 (1942), 127 Fed. (2d) 509.)

The proposal to creditors was not considered. Nothing further was done at the creditors meeting before the conciliation commissioner which was adjourned indefinitely and later held in abeyance before the district court pending the final determination of this cause.

On July 21, 1941, the clerk by letter notified counsel for the petitioner that the application to strike the real estate would be heard by the Judge on August 4, 1941. R. 17.

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<sup>2</sup> Although R. 13 shows that this proposal was "Filed December 4, 1941", this date is not the date of filing with the conciliation commissioner but the date when the conciliation commissioner's papers were filed with the clerk for the purpose of making up the transcript of the record on appeal. See paragraph number 9 of the designation at the top of R. 23.

On July 30, 1941, nine days after the clerk's notice by letter and twenty-one days after the creditors' meeting there was filed with the clerk an application for an order that the petitioner surrender his trucks to the Yellow Manufacturing Acceptance Corporation, the respondent here.<sup>3</sup> R. 2, entry of July 30, 1941. The petitioner and his counsel had no knowledge of this. R. 19, paragraph 1 and paragraph 6.

On August 4, 1941, the Judge being absent, the said real estate hearing set for that date was continued to the next day when it was heard.

### **The Origin of the Issues Here Raised.**

Neither the petitioner nor his counsel had any notice or knowledge on August 5, 1941, that an application for the surrender of the trucks to the respondent had been filed with the clerk or was to be heard. As just stated above, it was not filed until nine days after the notice of hearing on the real estate matter was given. R. 17. R. 2, entry of July 30, 1941. The first information they had of its filing was when, after the application to strike the real estate had been presented and taken under considera-

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<sup>3</sup> The conciliation commissioner's docket entries at R. 4 and 5 seem to show, at the top of R. 5, that at the creditors' meeting on July 1, a petition of the Yellow Manufacturing Acceptance Corporation was "filed in writing with the commissioner and referred to the . . . Judge of the District Court." It was not then filed or referred. The final order of the district court at R. 17, folio 21, recites that the petition of the YMAC was "verified on the 17th day of July, 1941" which was eighteen days after the creditors' meeting on July 1. The clerk's docket entries at R. 2, at the bottom of the page show: "July 30, 1941—Petition of Adolph Mandelker, on behalf of Yellow Mfg. Co., for an order that debtor return certain vehicles, rec'd. from Con. Com., filed." That is, the petition seeking the final order was not forwarded by the conciliation commissioner until twenty-nine days after the creditors' meeting on July 1 and nine days after the clerk's notice of hearing on the real estate petition.

Therefore if such a petition by the YMAC was ever filed with the conciliation commissioner, it was not filed on July 1, 1941, at the creditors' meeting but on some date from July 19 to 30 and it was not in existence on July 1. The appellate opinion says it was filed with the conciliation commissioner on July 20. R. 30, second paragraph.



tion, counsel for the respondent arose and presented the petition of the respondent to the Judge and requested an order thereon.

What followed is here copied from the "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" filed later on October 30, 1941. R. 18 to 20, paragraph 6:

"On said day of August 5, 1941, said Adolph I. Mandelker, as attorney for said Yellow Manufacturing Acceptance Corporation, presented said petition and motion to the judge. Whereupon the judge of said court asked counsel for said farmer debtor whether he had anything to say on behalf of the farmer debtor. Counsel for said farmer debtor thereupon addressed the court and said that no notice of the filing of said petition and motion had ever been given to or served upon the farmer debtor or his counsel and none of them had any knowledge of such filing; and further that no notice or knowledge had ever been given to or been possessed by said farmer debtor or his counsel that said motion or petition was set down for hearing or would be heard at any time or place; and further that said farmer debtor would not submit himself personally or by counsel to the jurisdiction of the court over the person or subject matter in relation to the said petition and motion; and further that for the court to take any action upon said petition and motion as so presented would deprive the farmer debtor of his constitutional right to have due process of law."

Nothing further was heard of the matter by the petitioner or his counsel until October 23 when a letter was received by his counsel from respondents' counsel and a copy of the order entered October 20 was served on him. R. 20, paragraph 7. The operative portion of this order reads:

"Ordered that the prayer of said petition be and it is hereby granted and that the debtor, Ernest Newton Kalb, is ordered and directed, within ten (10) days

from and after the service on him of a copy of this order to surrender and deliver to Yellow Manufacturing Acceptance Corporation the following personal property, to-wit:

One GMC, Model No. CC-394, Motor Co. C22874060, Chassis No. 2654.

One GMC, Model No. CC-152, Motor No. B22894076, Chassis No. 2163." R. 18.

The complete order is at R. 17 to 18.

On October 30, 1941, the petitioner filed his said "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" which states precisely the facts which raise the present issues here. R. 18 to 20.

On appeal the order of the district court was affirmed. R. 30 to 33. 127 Fed. (2d) 511. R. 34. Petition for rehearing denied R. 35.

## V.

### Specification of Errors.

The errors here specified were those of the bankruptcy court and of the appellate court which affirmed the final order of the bankruptcy court or the errors of the appellate court alone.

#### 1.

The bankruptcy court failed to observe the procedure required by Section 75(o).

#### 2.

The bankruptcy court erred in ordering the farmer debtor to surrender and deliver unconditionally to the mortgage holder his mortgaged property, thus removing

it from the sole jurisdiction, control, supervision and administration of the bankruptcy court in violation of Sections 75(e), (n), (o), and (p).

## 3.

The bankruptcy court erred in ordering the farmer debtor to surrender and deliver unconditionally to the mortgage holder his mortgaged property in violation of the general purpose of Section 75.

## 4.

The bankruptcy court erred in entering an order against the farmer debtor upon an application therefor which was presented without notice or knowledge on his part that such an application would be presented.

## 5.

The bankruptcy court erred in entering an order against the farmer debtor when he never had any knowledge or notice that an application therefor had been filed with the clerk prior to the presentation of said application to the court.

## 6.

The bankruptcy court erred in ordering the farmer debtor to surrender and deliver unconditionally to the mortgage holder his mortgaged property and thereby depriving him of the proceeds and use thereof.

## 7.

The bankruptcy court erred in surrendering its sole jurisdiction, control, supervision and administration of the property of the debtor involved in said order.

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8.

The bankruptcy court erred in entering said order which would deprive the farmer debtor of his rights under Section 75 in respect to said property.

9.

The appellate court erred in assuming that the petitioner ever promised to make any payment to the respondent.

10.

The appellate court erred in holding that if the petitioner promised to make a payment to the respondent outside of the course of procedure provided in Section 75, and failed to do so, he could be penalized or punished by the bankruptcy court by being compelled to deliver his property unconditionally to the holder of a mortgage lien against it.

11.

The appellate court erred in holding that the bankruptcy court had any power to surrender its jurisdiction and control over the mortgaged property of the farmer debtor by abandoning it and ordering the farmer debtor to surrender and deliver said property to the holder of a mortgage lien against it.

12.

The appellate court erred in holding that the farmer debtor could be held to his proposal to creditors made pursuant to Section 75(a) to (r) when said proposal was never submitted by the conciliation commissioner to the creditors, never considered by the creditors, never accepted by any of the creditors, nor confirmed by the court.

13.

The appellate court erred in holding that the bankruptcy court could surrender and abandon its jurisdiction, control, supervision and administration over the property of the farmer debtor by ordering him to surrender it to the holder of a mortgage lien upon it for failure by said farmer debtor to make a payment in accordance with a proposal made to his creditors and filed with the conciliation commissioner but never submitted to the creditors, never accepted by any creditor, and never confirmed by the court.

14.

The appellate court erred in looking "only to ascertain whether there was abuse of discretion by the bankruptcy court." Quoted from the opinion of the appellate court near the end. R. 33.

15.

The appellate court erred in holding that the final order of the bankruptcy court "only affects possession." Quoted from the opinion of the appellate court near the end. R. 33.

16.

The appellate court erred in holding that Section 75(e), or any other part of Section 75 gives to the bankruptcy court power to control the possession of the property of the farmer debtor by transferring it to another "pending negotiations" under the provisions of Section 75(a) to (r) for composition or extension. The words quoted appear near the end of the appellate court's opinion. R. 33.

17.

The appellate court erred in holding that "Also in this picture was the debtor's efforts to avoid the hearing when the creditor sought an order from the court for the possession of the trucks." The quotation is from the end of the appellate court's opinion. R. 33.

## VI.

**SUMMARY OF THE ARGUMENT.**

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## 1.

The order of the bankruptcy court is void because the court had no power to issue it.

## 2.

Even though the bankruptcy court had possessed power to issue such an order, it was issued without due process of law and is therefore void for that reason also.

## VII.

**ARGUMENT.**

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## 1.

The order of the bankruptcy court is void because the court had no power to issue it.

The amount of property involved is not great but the principle involved is the entire aggregation of all the provisions and the purpose of Section 75. If this order stands, its application in any former debtor proceeding will wholly destroy the effect of the Act and of all the twelve unanimous decisions of this court over a period of seven years which have interpreted and sustained it and its purpose.

The effect of Section 75 is not to be measured by the number of petitions filed under it but by its effect and the effect of this court's interpretative decisions upon the countless mortgage holders who, because of them, do not press their mortgagors to desperation.

Of all devices which have been tried out to defeat the purpose of Section 75, the one employed here is the simplest, and the most expeditious, and temporarily at any rate, it is crowned with clean-cut success. The proceeding is not dismissed but it is nevertheless left an empty shell.

This device, never before employed so far as reported cases show, merely orders the farmer debtor "to surrender and deliver" to the mortgage holder the trucks on which it holds a mortgage. R. 18, top of page.

Lest it be claimed that there is a blind spot in the statute which does not envisage an order for direct and unconditional surrender and delivery by the farmer debtor of his mortgage chattels to the mortgage holder, the pertinent and immediately applicable portions of the statute are here copied:

Section 75 (o): . . . "the following proceedings shall not be instituted" . . . "in any court or otherwise, against the farmer or his property" . . . [namely]: . . . "Seizure, distress" . . . "or other proceedings under" . . . "any" . . . "lein, chattel mortgage, conditional sales agreement, or mortgage."

Section 75 (p): "The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property," . . . All such property shall be

under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors as provided for in Section 75 of this Act."

Section 75 (n): "The filing of a petition" . . . shall immediately subject the farmer and all his property . . . for all the purposes of this section, to the exclusive jurisdiction of the court, including all" . . . "personal property, or any equity or right in any such property" . . .

Section 75 (e): . . . "After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems best in the interests of the farmer and his creditors."

The procedural facts in this case bring the prohibitions of the Act squarely in operation against them:

1. **The proceeding is pending between the filing of the petition and the disposition of the proposal to creditors.** The proposal has been made but never presented to the creditors or acted upon. The first creditors' meeting stands adjourned subject to the call of the conciliation commissioner. R. 13 to 15, R. 15, R. 16, folio 20, R. 4 to 5, folio 5.
2. **The proceeding of the respondent was instituted for the seizure and distress of the farmer debtor's property.** R. 17 to 18, folio 21 and 22.
3. **It was a proceeding in court by a creditor seeking the debtor's property by distress.**
4. **It took that property from the sole jurisdiction and control of the court and conferred it unconditionally to the mortgage holder where it was not subject to the payment of the farmer debtor's creditors as provided in Section 75.**



5. It deprived the court for **all purposes of Section 75** of the **exclusive jurisdiction of the court.**

The reason for these unusual and carefully guarding protective measures was no doubt to retain in all but the most unusual circumstances the property in the jurisdiction of the bankruptcy court, and yet to make it possible for an exception to be made for highly perishable property such as, for example, fruits, vegetables, or goods in transit, etc.

This court said in *Adair v. Bank* (1938), 303 U. S. 350, at pages 356 and 357 that Section 75(e) and (n) provides for "control" of the property and that "These provisions look toward the maintenance of the farm as a going concern" . . . In that case the question was whether the proceeds of a crop should go to the holder of a mortgage on the crop. This court said they should not, but should be devoted to making the farm a going concern. And at page 360: "The filing of his petition put the property in the control of the court and the harvesting of the crop and the **preservation of the property** became a matter for the concern and action of the court."

All of the decisions of this court and of the appellate courts cited in the petition herein at pages 8 to 13 are against any interpretation of Section 75 and its purpose which would under any circumstances justify the order of the bankruptcy court which the appellate court below sustained. No reported decision will lend any aid or comfort to the respondent in seeking support for the order.

The record will be searched in vain for a single citation of any decision by either the district court or the appellate court which would even indirectly sustain the order. Nor has the respondent either in the district court or in the appellate court suggested any such authority.

Indeed it is probable that the order was sought and obtained upon the theory that the property involved is so small that the petitioner would suffer the emasculation of

the law rather than undertake its defense and the defense of his rights, or that if he did, this court would consider the issues too insignificant for notice.

It is to be particularly noted that even in a proceeding pending under regular bankruptcy where there is no provision for rehabilitation but a quick dispossession of the bankrupt, and distribution of his property among his creditors, and where there is no specific prohibition to match any of the several found in Section 75, this court has firmly required that the bankruptcy court must retain the estate in its jurisdiction and administer it, declaring that a bankruptcy court may not abandon the property or surrender its jurisdiction. Of the four decisions by this court on this subject cited at page 11 of the petition herein three of them involved regular bankruptcy before any farmer debtor legislation had been enacted. The fourth, decided in 1940, involved a railroad debtor proceeding under Section 77 in which there is no prohibition matching any of those in Section 75.

It is therefore asserted that the order of October 20 was void from its entry because the bankruptcy court lacked the power to issue it.

## 2.

Even though the bankruptcy court had possessed power to issue such an order, it was issued without due process of law and it is therefore void for that reason also.

### (1)

The procedure by which the order was sought and obtained was in violation of the specific process prescribed in Section 75(o) that:

**"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted" . . .**

Five distinct procedures are required by this provision before any property of the farmer debtor may be interfered with while a proceeding is pending for composition or extension. They are:

1. A petition made to the judge,
2. referred to the conciliation commissioner for hearing,
3. made the subject of a hearing before the conciliation commissioner,
4. reported back after hearing by the conciliation commissioner to the judge,
5. and granted by the judge after he has had an opportunity to examine the results of the hearing and the report of the conciliation commissioner.

These detailed requirements and the other repeated general statements of purpose contained in Section 75(e), (n), and (p), emphasize the intention of the Act that none but the gravest reason would justify any modification of the proceeding that would interfere with the right of possession, use and opportunity for redemption in the farmer debtor.

None of these five requirements was observed. The petition was not made to the judge but referred by the conciliation commissioner. Clerk's docket entry of July 30, 1941. R. 2. It was not referred to the conciliation commissioner by the judge for hearing. R. 17, folio 21. There was no hearing before the conciliation commissioner. R. 4, folio 5; R. 18 to 19, folio 21. It was not, of course, reported back after hearing by the conciliation commissioner to the judge. And finally it was not granted by the judge after he had considered the evidence of a hearing before the conciliation commissioner and the recommendation or report of the conciliation commissioner.

It is very clear that if the order sought had been one which the Act would permit, the method of obtaining it

was in violation of the mandatory requirements laid down and therefore such an order would have been in vain.

(2)

But in a larger sense the order was void because in obtaining it, that due process of law was violated which is required by the Fifth Amendment.

The method employed is clearly stated in the farmer debtor's "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" at R. 18 to 20, beginning at folio 23. They are:

1. No notice was given that an application for the order has been filed with the clerk.

2. No notice was given that it was set down for hearing.

3. A notice of hearing of an entirely different matter, involving real estate, not chattels, and involving different creditors, not including the respondent, was received.

- (4 and 5. The noticed matter was heard and taken under advisement.)

6. Counsel for the respondent asked the judge for the order and counsel for the petitioner explained to the judge that no notice or knowledge of the filing of the application had been given to or possessed by the debtor or his counsel, or that it was set for hearing, and that he could not submit himself to the jurisdiction of the court to hear it.

7. That neither the petitioner nor his counsel had any other knowledge of the order until it was served after its entry.

What due process of law is has often been explained. The statement in 6 Ruling Case Law, "Constitutional Law," Section 442, is as good as any:

"The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case."

It quotes Daniel Webster's definition, which was noted by Judge Cooley, as:

"A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

It sums up the definition by saying:

"It is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered."

Adequate preliminary notice of the subject and of the time and place of its hearing are required so that preparation may be made and the presence of witnesses secured.

In *Holden v. Hardy* (1898), 169 U. S. 366, 389, this court declared:

"It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

In *Galpin v. Page* (1874), 85 U. S. (18 Wall.) 350, this court said at page 368:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered."

*Williamson v. Berry* (1850), 49 U. S. (8 How.) 495, 541:

"But if it [a court] act without authority, its judgments and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers.

This distinction runs through all the cases on the subject."

In *Sheets v. Livy*, C.C.A. 4 (1938), 97 Fed. (2d) 674, during the days when the farmer debtor cases were being dismissed for "lack of good faith" before this court decided *John Hancock v. Bartels* (1939), 308 U. S. 180, the appellate court declared there was abundant evidence "most of which was given by the debtor himself" justifying dismissal of the proceeding but held that:

"The District Judge was nevertheless in error in denying the amended petition and dismissing the proceedings for two reasons. It was improper, no matter how strong the evidence of lack of good faith, to take this action without notice to the debtor and an opportunity to be heard."

*In re Rosser* C.C.A. 8 (1900), 111 Fed. 106, a referee in bankruptcy issued notice of a first creditors' meeting, and the bankrupt received the notice. At the meeting the bankrupt was examined, and at the conclusion of the examination the referee issued an order upon the bankrupt to turn over \$2,500 to the trustee. In its decision the Circuit Court of Appeals said:

"Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involved. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

*Boyd v. Glucklich*, C.C.A. 8 (1902), 116 Fed. 131 and *In re Frank*, C.C.A. 8 (1910), 182 Fed. 794, are essentially the same. In one of them two days' notice was given which the court held to be inadequate.

The last three cited decisions were grounded upon *Galpin v. Page*, 85 U. S. (18 Wall.) 350, quoted above at page 31 of this brief.

Reported cases do not show any instance of a violation so clear as this of that due process which is guaranteed by the Fifth Amendment.

## 3.

**The Order Examined.**

R. 17 to 18, folio 21 and 22

Some peculiarities of the order of October 20 are:

1. **No mention** is made of the **filing of the petition** for the order or of any notice. The filing was on July 30 **after** notice was given on July 21 of the hearing of the real estate matter. The **date of verification** of the petition on July 19 **is given**; it **preceded** the notice of July 21 by two days.

2. It avoids stating that any **evidence or argument** was heard. It merely says the YMAC was **represented** by its attorney, and "the debtor and his attorney" **being present**, and the court having heard the statements of counsel and "upon all the papers, files and proceedings had herein," it appearing at the YMAC is entitled to the relief prayed for.

3. It is entered not upon the evidence, but "upon motion" of the attorney for the YMAC, etc.

The proponent of the order who drafted and presented it to the Court undoubtedly was aware of its weakness. The significance of these peculiarities is apparent.

## 4.

**The Opinion of the Appellate Court Examined.**

R. 30 to 33

1. R. 30: "On July 20, 1941, appellee filed its petition with the conciliation commissioner." There is no evidence in the record that such a petition was so filed on July 20.



2. R. 31: (1) "It is also **argued** that debtor's attorney was apprised of the filing of the appellee's petition with the conciliation commissioner." (2) "Convinced as we are that **debtor was informed of appellee's petition**, we come directly to the debtor's excuses for failure to make the **payments he agreed to make.**"

Twice in this quotation a subject is mentioned that may have two different aspects, and it is assumed later in the opinion that one aspect is exclusively the true one.

(1) The record is devoid of any evidence that the petitioner or his attorney was informed of the filing of the YMAC petition until it was presented on August 5, 1942. In the YMAC brief in the appellate court it was "**argued**" **de hors the record**, that certain correspondence concerning a document forwarded to the petitioner's counsel proved that he knew it was **filed**, or was to be filed. The entire correspondence on the subject would show that the petitioner's counsel strenuously maintained that a "**proposed petition**" was not within the conciliation commissioner's power to entertain and should not be filed. And it also referred to a blank form of "**proposed 'Order to Show Cause'**" (to which the **proposed** petition was **annexed**) which so far as is known, never was filled out or signed, and **never was filed anywhere**. Said proposed order provided for service of the order and of the proposed annexed petition. The proposed "Order to Show Cause" and the proposed petition were never served by the conciliation commissioner as requested.

Any evidence on this subject that might have been introduced into the record would have left it precisely as it is—namely that neither the petitioner nor his counsel ever had any notice or knowledge that the respondent's petition was ever filed anywhere until its counsel presented it to the judge on August 5, 1941.

(2) Later in the opinion the words, "**payments he agreed to make**" are treated as if referring to the farmer debtor's proposal to creditors filed with the conciliation commissioner. His proposal is at R. 13 to 15. Again they are treated as if referring to correspondence which the respondent introduced into its brief **de hors the record**. (e.g. R. 33: "good faith of his promises"; "promises *v.* non-action"; "Debtor made a promise"; "The payments so promised however were not forthcoming"; "proposed to change the terms of debtor's promise"; "Creditor was interested in payments, not in promises"; "The district court was justified in considering debtor's promises"; "his failure to keep the promises"; "his efforts to change the promises".

As the most cursory reading of Section 75 discloses that the proposal to creditors is not effective until **accepted by creditors** (as this one was not) **and confirmed by the court**, (as it was not), and the first principle of the law of contracts is that an offer (if the letter of July 2 lugged in **dehors the record** contains an offer), is not even an obligation **until accepted**, it is believed no further comment is necessary anent the "**payments he agreed to make.**"

3. R. 32: "His contention that he has been denied his property without due process of law, i.e., **notice is frivolous.**"

After again referring to correspondence (being only part of all the correspondence on the subject), which was quoted in its **brief** by the respondent **dehors the record**, the opinion says debtor's letter acknowledges receipt of the "**petition for surrender of the trucks**" and "he filed no objection thereto." Here again we have an example of that term of the subject of Logic called "An undistributed middle."

The correspondence which was referred to **did not** acknowledge receipt of a petition for surrender of the trucks. Reference was made to a blank form of "**proposed** Order to Show Cause" and a "**proposed** Petition" annexed to it. There was no information that either **was to be** filed or **was** filed. Strenuous objections were made, in the same incomplete correspondence **dehors the record** which the opinion took from respondent's brief, that the conciliation commissioner had no authority to entertain either the proposed order to show cause or the proposed petition. As the proposed blank form of "Order to Show Cause" was never filled out and **served** with the "annexed Petition" by the conciliation commissioner the petitioner was justified in believing that neither was **filed**.

4. R. 32, At note \*\* at bottom of page: "The **letter of debtor's counsel** showed **conclusively** that the debtor's statement to the court that he was unaware of the **existence of the petition, was untrue.**"

Here again the opinion is unclear about the subject of its remarks. The "letter of debtor's counsel" may be a letter to the conciliation commissioner or a letter to counsel for respondent. The letter to counsel did not acknowledge receipt of any petition. A letter to the conciliation commissioner stated he had received from respondent's counsel a "**proposed order to show cause**" and a "**proposed petition.**" Neither are in the record. They were that **part only** of certain correspondence which the respondent quoted in its brief in the appellate court.

The "debtor's statement to the court" is in the "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941." Paragraph 6, R. 19 to 20.

There is nothing in the record or in the incomplete correspondence, foreign to the record, which was inserted in the respondent's brief to the appellate court, to support the statement that the "debtor's statement to the court that he was unaware of the existence of the petition, was untrue."

All of the "statement to the court" found in not only paragraph 6 but in all seven paragraphs of the petitioner's "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" at R. 18 to 20, stands unchallenged **by the record** or by any correspondence or by **any fact**. They are:

1. **Petitioner never had any notice** that any such YMAC petition had been filed with the clerk.
2. **Nor that it was ever set for hearing.**
3. **Notice of the hearing of the real estate petition and no other** was received prior to August 5 when the truck petition was presented.
4. The real estate hearing set for August 4 was continued to August 5.
5. The real estate matter was heard on August 5.
6. On August 5 counsel for the YMAC presented the truck petition and upon invitation of the Judge, counsel for the petitioner said:
  - (a) No notice of the filing of said petition had ever been served on the petitioner or his counsel.
  - (b) None of them had any knowledge of its filing.
  - (c) No notice or knowledge was had by any of them that it was set for hearing or would be heard anywhere at any time.
  - (d) The petitioner could not submit himself or the subject to the jurisdiction of the court as he would be deprived of his due process of law.

7. The first knowledge of said order of October 20 came to the petitioner and his counsel on October 23.

### VIII.

#### CONCLUSION.

The order, sustained by the appellate court, should be reviewed by this court because:

The construction of a federal statute is involved.

An important question of procedure under a federal statute should be decided.

The Circuit Court of Appeals below has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

It has decided an important question of federal law not settled by this court.

Its decision conflicts with applicable decisions of this court on the statute involved.

Its decision conflicts with principles of long established general law.

It has sanctioned a departure from the usual course of judicial proceedings by the bankruptcy court.

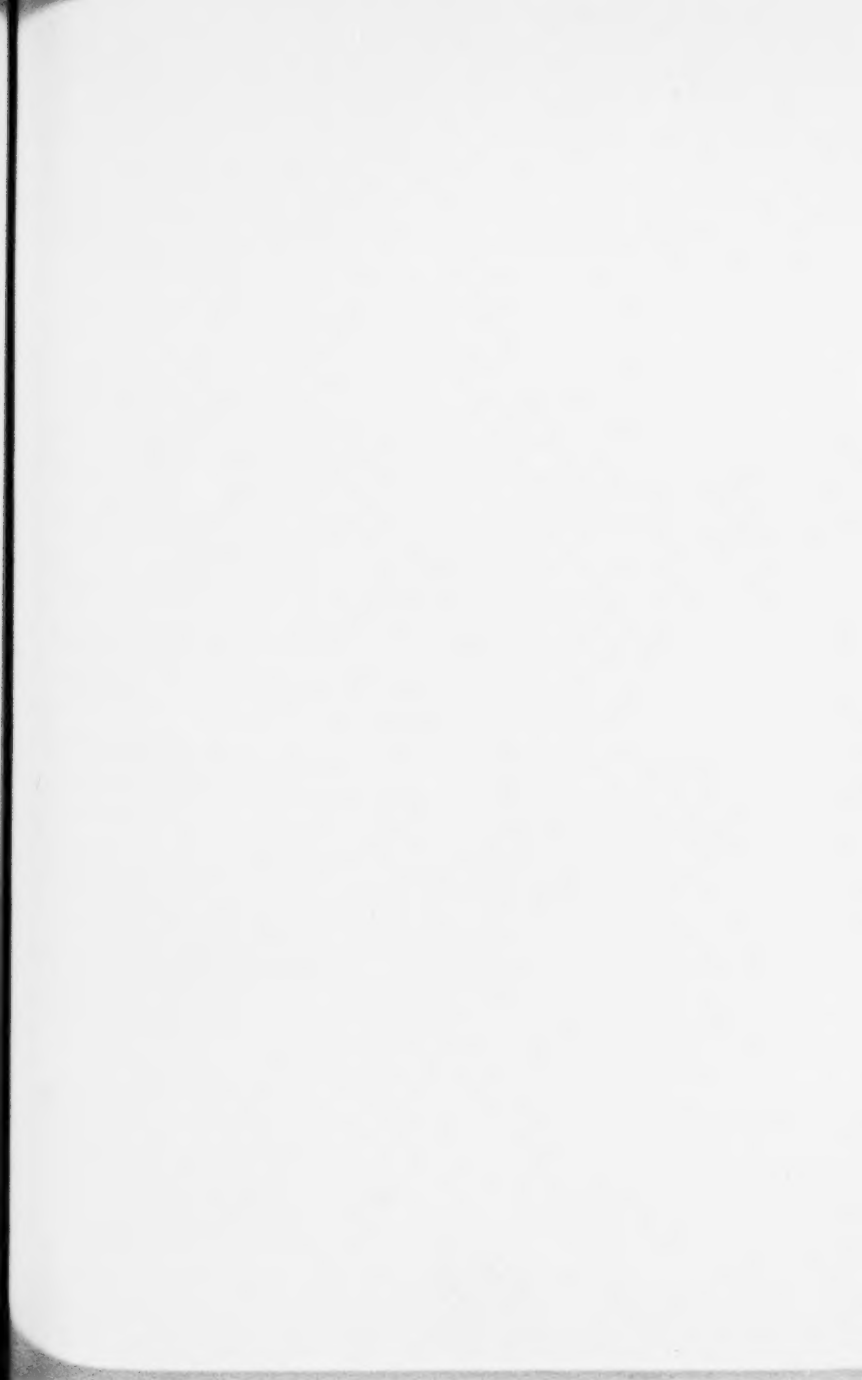
Respectfully submitted,

ELMER McCLAIN,

*Counsel for the Petitioner,  
Newton Kalb.*

Lima, Ohio

August 19, 1942.





(2)

SEP 18 1942

CHARLES EDMOND ORRLEY  
CLERK

In The  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1942

No. **347**

**ERNEST NEWTON KALB,**

Petitioner,

vs.

**YELLOW MANUFACTURING ACCEPTANCE  
CORPORATION,**

Respondent.

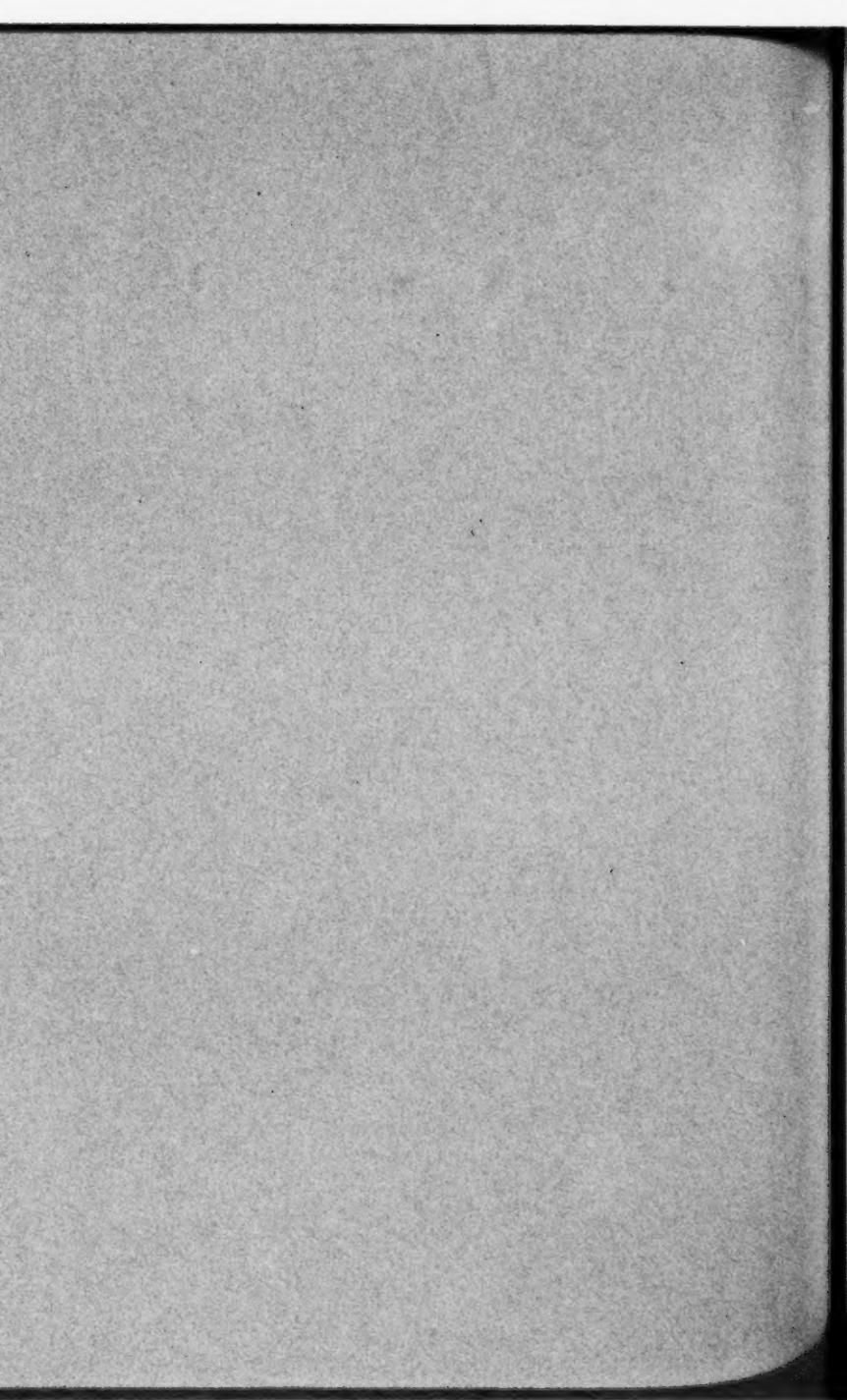
On application for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Seventh Circuit.

**RESPONDENT'S BRIEF.**

**DAVID CHARNESS,**  
Milwaukee, Wisconsin,  
Counsel for Petitioner.

**ADOLPH I. MANDELKER,**  
of Counsel.





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In The  
**SUPREME COURT OF THE UNITED STATES**

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No. ....

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Circuit Court of Appeals for the Seventh Circuit.

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**RESPONDENT'S BRIEF.**

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**NATURE OF PROCEEDINGS.**

This is an application by petitioner for the issuance of a writ of certiorari to review a decision of the Circuit Court of Appeals for the Seventh Circuit, rendered on

April 20, 1942, in *In re: Kalb vs. Yellow Manufacturing Acceptance Corporation*, 127 F. 2d 511.

### STATEMENT OF FACTS.

The farmer debtor filed his petition in proceedings under Chapter 75 of the Bankruptcy Act on May 28, 1941. On June 2, 1941, the matter was referred to F. H. Belton, Conciliation Commissioner, at Elkhorn, Wisconsin. Attached to the petition was schedule A-2 in which Yellow Manufacturing Acceptance Corporation, Detroit, Michigan, was listed as a secured creditor having a chattel mortgage on two General Motors trucks of one and one-half (1 1/2) ton and three-quarters (3/4) ton each. Attached to the petition and constituting a part of the proposal is the following:

#### Yellow Manufacturing Corporation:

To pay said debt in full as per terms of the mortgages of said security. The provision first stated as to time being computed from the date of confirmation of this offer not to apply to this creditor. (R. 14)

The Conciliation Commissioner noticed the first meeting of creditors at Elkhorn, Wisconsin, on July 1, 1941, and at that meeting H. Feuerstein and Helen Feuerstein, who had been listed as secured creditors in the schedules, filed a petition with the Conciliation Commissioner requesting an order striking certain real estate from the debtor's schedules. At that hearing the petitioner was present and represented by Elmer McClain, his attorney and respondent was represented by Adolph I. Mandelker, its attorney. The question of respondent's secured claim was considered by the Conciliation Commissioner and after discussion thereon an agreement was made at the hearing approved by the Conciliation Commissioner and agreed to by the

petitioner and his attorney and by the attorney for the respondent to the effect that payments as provided for in the contracts would be made upon the secured claims of the respondent to the Conciliation Commissioner, who would hold the same in escrow until further proceedings had been had in the matter.

On July 20, 1941, Adolph I. Mandelker, attorney for Yellow Manufacturing Acceptance Corporation, filed with the Conciliation Commissioner a petition on behalf of said creditor, which petition is as follows:

**In The**  
**District Court of the United States**  
**For the Eastern District of the State of Wisconsin**

In the Matter of

**ERNEST NEWTON KALB,**

**Debtor.**

} In Proceedings for a  
Composition or  
Extension.

To: **GEORGE H. BELTON,**  
Conciliation Commissioner:

The petition of *Adolph I. Mandelker*, respectfully represents and shows as follows:

1. That he is the attorney for Yellow Manufacturing Acceptance Corporation, a foreign corporation, duly licensed to do business in the State of Wisconsin. That there is no officer of said corporation presently in the State of Wisconsin and that your petitioner makes this petition

for and on behalf of said Yellow Manufacturing Acceptance Corporation, being authorized to do so.

2. That Yellow Manufacturing Acceptance Corporation is listed in the schedule of "creditors holding securities" filed in the above entitled matter as holding liens on the vehicles hereinafter described.

3. That Yellow Manufacturing Acceptance Corporation is the present owner and holder of a certain conditional sales contract executed on the 23rd day of November, 1940, by and between Ernest Kalb, as buyer, and Melcher Nash Sales of Elkhorn, Wisconsin, as seller. That said contract was in the original amount of One Thousand One Hundred Sixty Five and Ninety-five hundredths (\$1165.95) Dollars. That said contract provided for the purchase and sale of

One GMC Model No. CC-304, Motor No. C22874060,  
Chassis No. 2654.

That at the time said contract was acquired by Yellow Manufacturing Acceptance Corporation there was a deferred balance due thereon of Eight Hundred Twenty Two and Ninety-five hundredths (\$822.95) Dollars. That said contract provided for the payment of the sum of Forty Five and Seventy-two hundredths (\$45.72) Dollars on the 10th day of each month beginning with the 10th day of January, 1941. That the payments which became due on the 10th day of June, and the 10th day of July, 1941, have not been paid and that said contract is in arrears in the sum of Ninety One and Forty-four hundredths (\$91.44) Dollars.

4. That Yellow Manufacturing Acceptance Corporation is the present owner and holder of a certain conditional sales contract executed on the 11th day of April, 1941, by and between Ernest Kalb, as buyer, and Melcher Nash Sales of Elkhorn, Wisconsin, as seller. That said contract was in the original amount of Nine Hundred Four and Fifty-four hundredths (\$904.54) Dollars. That said contract provided for the purchase and sale of

One GMC, Model No. CC-152, Motor No. B22894076,  
Chassis No. 2163.

That at the time said contract was acquired by Yellow Manufacturing Acceptance Corporation there was a deferred balance due thereon of Six Hundred Thirty One and Forty-eight hundredths (\$631.48) Dollars. That such contract provided for the payment of the sum of Thirty Five and Eight hundredths (\$35.08) Dollars on the 11th day of each month beginning with the 11th day of May, 1941. That the payments which became due on the 11th day of June and the 11th day of July, 1941, have not been paid and that said contract is in arrears in the sum of Seventy and Sixteen hundredths (\$70.16) Dollars.

5. That in the proposed plan filed by petitioner, Ernest Newton Kalb, it was proposed that all payments upon the aforescribed contracts would be made as due pursuant to the terms of said contracts.

6. That at the hearing held before George H. Belton, Conciliation Commissioner, at Elkhorn, Wisconsin, on July 1, 1941, it was agreed by the petitioner, Ernest Newton Kalb, and his attorney, and your petitioner, as the attorney for Yellow Manufacturing Acceptance Corporation, that said Ernest Newton Kalb would be allowed to retain possession of the above described vehicles on condition that payment of Eighty and Eighty hundredths (\$80.80) Dollars would be made each month commencing immediately to George H. Belton, Conciliation Commissioner, who would hold the same in escrow for future disposition thereof. That such payment would be considered as evidence of the good faith of said Ernest Newton Kalb.

7. That attached hereto and marked Exhibit "A" is a copy of a letter received by your petitioner under date of July 3, 1941, from the attorney for Ernest Newton Kalb, and that attached hereto and marked Exhibit "B" is a



copy of a letter addressed to the attorney for Ernest Newton Kalb in reply to said Exhibit "A".

8. That your petitioner has not to the date of the signing of this petition been advised that any payment has been made to the Conciliation Commissioner upon the aforedescribed conditional sales contracts as agreed in open Court on July 1, 1941, as hereinbefore stated.

9. That by the terms of the conditional sales contracts heretofore described the title to the above described vehicles do not vest in Ernest Kalb, he having only the right of possession when not in default, and that Yellow Manufacturing Acceptance Corporation is entitled, by the terms of said contracts, to the immediate possession thereof upon default in payments.

10. That the vehicles described heretofore and sold under the terms of the conditional sales contracts are depreciating in value and that continued use thereof by the petitioner without payment of the installments due thereon is detrimental to the interests of Yellow Manufacturing Acceptance Corporation.

11. That the failure of Ernest Newton Kalb to deposit the moneys as agreed on July 1, 1941, is wilful and in the opinion of your petitioner is evidence of the bad faith of said Ernest Newton Kalb, insofar as the interests of Yellow Manufacturing Acceptance Corporation is concerned.

*Wherefore* your petitioner prays for an order upon said Ernest Newton Kalb requiring him to surrender the herein described vehicles to Yellow Manufacturing Acceptance Corporation or for such other order or relief as may be fair and proper in the premises.

ADOLPH I. MANDELKER.

State of Wisconsin, }  
 Milwaukee County. } ss.

I, *Adolph I. Mandelker*, the petitioner named in the foregoing petition do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

ADOLPH I. MENDELKER.

Subscribed and sworn to before me this 19th day of July, 1941.

ROBERT D. JONES,  
 Notary Public, Milwaukee County, Wisconsin.

My Commission expires: Aug. 20, 1944.

### **Exhibit "A"**

ELMER McCLAIN  
 Attorney at Law  
 L I M A, O H I O

July 3, 1941

Mr. Adolph I. Mandelker  
 Attorney at Law  
 606 West Wisconsin Avenue  
 Milwaukee, Wisconsin

Dear Mr. Mandelker:

Re: *Ernest N. Kalb*

Your letter of July 2 came this morning. Mr. Kalb filed his farmer debtor petition solely because he wishes to regain his farm which the mortgage holder has illegally held since March 15, 1935. (See *Kalb vs. Feuerstein*, 308 U. S. 433.)

Your client is entitled to be paid and Mr. Kalb proposes to pay in full but he would like to slow up some on the amount of the payments until the issue raised by the motion and petition to dismiss the farm is adjudicated.

This is a drain on his resources which he had not anticipated and it comes at a time when he must slacken up on his hauling to attend to his farming. And his farming requires expense now with no present income.

So I wish to ask whether your client will not be willing to accept one-half of the stipulated payments, either \$80.80 every alternate month or \$40.40 each month. Mr. Kalb is, and probably will continue to be, a good customer and he takes excellent care of his trucks. I think also there is ample equity in the security, especially in view of rising prices.

Yours very truly,

ELMER McClAIN (SIGNED)

Elmer McClain

EmcC:V

**Exhibit "B"**

July 5, 1941

Mr. Elmer McClain  
Attorney at Law  
Lima, Ohio

Re: *Ernest Kalb*

Dear Sir:

I have your letter of July 3 in the above-entitled matter and have noted its contents.

If the petition had not been filed, client would expect Kalb to make his payments as they come due. If all creditors had accepted the offer made on

Tuesday last, the payments would be due as contracted. I can, therefore, see no merit in Mr. Kalb's request for a fifty per cent reduction in payment on the contracts.

I will expect Mr. Kalb to make the first payment to the Commissioner in the next few days.

Very truly yours,

ADOLPH I. MANDELKER.

AIM:sg

A copy of said petition and the letter accompanying the same to the Commissioner was forwarded by the respondent's attorney to the petitioner and his attorney.

The Conciliation Commissioner sent such petition to the Clerk of the District Court and it was filed by said Clerk on the 30th day of July, 1941. The Feuerstein petition came on for hearing before the Judge of the District Court on August 5, 1941. At that time the debtor and his attorney were present in Court. On the same day and directly following the hearing on the Feuerstein matter, while the debtor and his attorney were in Court, the Court took up the matter of the consideration of the petition of the Yellow Manufacturing Acceptance Corporation, and after hearing thereon ordered the trucks to be turned over to the Yellow Manufacturing Acceptance Corporation, which order was formally entered on October 20, 1941.

It is to be particularly noted that in the proposal to this secured creditor (R. p. 14), debtor made no request for either a composition or extension, his offer being:

"Yellow Manufacturing Corporation;

To pay said debt in full as per terms of the mortgages of said security. The provision first states as to time being computed from the date of confirmation of this offer not to apply to this creditor."

Respecting this offer, and the failure of the debtor to comply therewith, the lower court said in its decision (127 F. 2d 513):

“Debtor made a promise to pay the purchase price of the two trucks. He asked no concession as to these two notes in his offer of compromise to the Conciliator, and he fixed the amounts and dates when he would make payments on said notes. This offer invited confidence in debtor’s asserted good faith. The payments so promised, however, were not forthcoming. After missing two months’ payments and when the creditor sought enforcement of the chattel mortgages, debtor’s counsel proposed to change the terms of debtor’s promise. He did not, however, make any payment on debtor’s past indebtedness.”

### ISSUES INVOLVED.

- I Did the District Court Have the Power to Make the Order Involved.
- II Did the Petitioner Have Notice of the Proceedings.

### DECISION OF APPELLATE COURT.

The decision of the Circuit Court of Appeals for the Seventh Circuit is to be found in 127 F. 2d 513, where the Court said:

“This situation called for the exercise of judicial discretion. It was a discretion for the District Court to exercise. On review, we look only to ascertain whether there was an abuse of such discretion. We find none.

This order only affects possession. Sec. 75 (e) gives to the court power to control property and its possession pending negotiations.

The District Court was justified in considering debtor’s promises, his failure to keep the promises, his effort to change the promises without making

any payments of the lesser sum which he proposed. Also in this picture was the debtor's effort to avoid the hearing, when the creditor sought an order from the court for the possession of the trucks."

## **Argument.**

### **I.**

#### **The District Court did have the Power to Make the Order Involved.**

- (a) Section 75 (e) of the Bankruptcy Act conferred highly discretionary powers upon the Court.

Section 75 (e) of the Bankruptcy Act provides that: "after the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the Court, the Court shall exercise such control over the property of the farmer as the Court deems in the best interests of the farmer and his creditors."

This section clearly confers upon the Court Control over the property of the farmer prior to confirmation or any other disposition of the proposal in the best interests of the farmer and his creditors.

It clearly gives to the Court the right to exercise its own discretion, uncontrolled by any other mandatory provision of the act, in dealing with the property of the debtor during the pendency of the composition or extension proposal. It calls upon the Court to exercise its discretion for the best interests of the farmer and his creditors.

It does not say that a creditor's rights should be disregarded. It does not say that his security should not be protected. It does not say that the farmer is entitled to continue in possession of property in all events. It vests the Court with absolute discretion in the control of the property involved. It is an administrative power. This

is a highly discretionary power and, unless there is a clear abuse thereof, the action of the Court should not be disturbed. In *Continental Illinois National Bank & Trust Co. vs. Rock Island Ry.*, 294 U. S. 648, 677, 55 S. Ct. 595, 606, 79 L. Ed. 1110, the court was asked to disturb an order denying a petition for leave to sell collateral security on the ground of depreciating values. This Court in describing the power of the Court to deal with the control of property during reorganization proceedings said:

“It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. —A claim that injurious consequences will result to the pledgee or mortgagee may not, of course, be disregarded by the District Court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.”

To the same effect see *Heffron vs. Western Loan & Building Co.*, 84 F. 2d 301.

**(b) The Court Exercised Its Discretion Properly.**

The proposal of the petitioner did not ask this creditor for a composition or extension. It offered to make payments under the original terms of the purchase contract. Its offer was accepted by creditor. The debtor failed to keep his promise and make his payments. The Court was then asked to return the possession of the trucks to the creditor in order that its security should be protected. This was a petition directed to the sound discretion of the Court. It had before it the debtor's proposal and the affidavit of creditor's attorney showing failure of the debtor to comply with his own proposal. The Court was being asked not only to pass on what was for the best interests of

the debtor but also for the best interests of the creditor. This discretion was clearly granted to it by section 75 (e). As the Appellate Court said, it was a situation calling for the exercise of judicial discretion, and it was not called upon to disturb an order, administrative in character, and calling for the exercise of sound discretion.

(c) **The Decision of the Appellate Court is in Accord with other Decisions.**

None of the decisions cited by petitioner go to the question of the right of the Court under section 75 (e) to exercise its power and control over property of the debtor in a discretionary manner. They go, only to the right to abandon its jurisdiction over such property. The order here did not release jurisdiction over the property but merely directed its possession to change hands pending the proceedings. This was a discretionary power. The decision of the Circuit Court of Appeals holding that it was such a discretionary power, and that the exercise thereof was not an abuse of discretion, is in accord with *Continental Illinois National Bank & Trust Co. vs. Rock Island Ry.*, and *Heffron vs. Western Loan & Building Co.*, *supra*.

## II.

### **The Petitioner Had Sufficient Notice of the Proceedings in the District Court.**

(a) **Petitioner was Charged with Constructive Notice of the Creditor's Petition.**

The debtor was charged with notice of the petition of Yellow Manufacturing Acceptance Corporation filed with the Conciliation Commissioner and with the Clerk of the District Court on July 30, 1941.

The proceedings in question are under Section 75 of the Bankruptcy Act, which is a proceeding by farmer debtor



for composition or extension of debts. In proceedings of this nature the initiative and burden is upon the debtor and he is charged with notice and knowledge of every stage of the proceedings.

The rule has been stated in *In re: Henderson* (C. C. A. 5), 100 Fed. (2) 820, that in a proceeding by a debtor for a composition or extension of his debts, the debtor is charged with notice of the various steps taken in the proceedings, which includes the reports of the Conciliation Commissioner and the supervising Conciliation Commissioner.

It has also been stated in *Massey vs. Farmers & Merchants Nat. Bank & Trust Co. of Winchester, Va., et al* (C. C. A. 4), 94 Fed. (2d) 526, that in agricultural composition proceedings a debtor is bound to take notice of the filing of the Conciliation Commissioner's report recommending dismissal of the petition.

The burden is thus placed upon the debtor to watch the proceedings, particularly the reports of the Conciliation Commissioner as filed with the Clerk of the Court in which the proceedings are pending.

It would appear from the docket entries of the Clerk of Court that on July 30, 1941, the petition of Adolph I. Mandelker, on behalf of Yellow Manufacturing Acceptance Corporation, was filed. It would also appear from the docket that on July 18, 1941, the Feuerstein petition had been filed together with a report of the Conciliation Commissioner on that petition. Thus the docket clearly gave notice to the debtor and his attorney of the pendency of both petitions before the Court. The matters involved in this petition affected the alleged assets of the debtor, which were under the supervision and control of the Court. With respect to the proceedings on the Feuerstein petition it would appear that notice of hearing thereof had been given to the attorney for the debtor by the Clerk of the District Court by letter on July 21, 1941.

These proceedings are in rem and the supervision of the property was before the Court at all times, and the debtor is under the decisions charged with notice of all proceedings in rem affecting said property.

The debtor, therefore, in this matter is charged with notice and knowledge of the proceedings before the Commissioner and before the Court as disclosed by the docket of the Clerk of the District Court.

(b) **Petitioner Had Actual Knowledge of Creditor's Petition.**

The petitioner had actual notice of the petition pending before the Conciliation Commissioner and the Court.

The attorney for the petitioner not only received a copy of said petition and order to show cause and copy of the letter sent to the Conciliation Commissioner but did on the 24th day of July, 1941, address a letter to the Conciliation Commissioner, which letter was in the nature of a reply to said petition and which letter is as follows:

**ELMER McCLAIN**

Attorney.

L I M A, O H I O

July 24, 1941

Honorable George H. Belton  
Conciliation Commissioner  
Elkhorn, Wisconsin

Dear Mr. Belton:

Re: *E. N. Kalb, Farmer*  
*Debtor, Case No. 22114*

Upon my return to my office after several days absence I have before me a copy of a letter from Attorney Mandelker to you together with a copy of

a proposed "Order to Show Cause" and a copy of a proposed petition by Attorney Mandelker.

I must oppose any procedure as suggested by Attorney Mandelker.

It is true that Mr. Kalb desires to and will undoubtedly pay the Yellow Manufacturing, etc. Company in full. His proposal is before the court and upon its acceptance as provided by the statute it will be complied with.

The conciliation commissioner has no power to issue such an order as is proposed. The "red tape" referred to are the legal provisions enacted to protect the farmer debtor and his property while the case is pending in the federal court. What is asked here that the conciliation commissioner do is exactly what the Supreme Court has decided the court may not do. The Supreme Court has also decided that even by the consent of the farmer debtor, the court may not deviate from the procedure prescribed by statute.

It is also true that it was not the debt due the Yellow Manufacturing Company that caused Mr. Kalb to file his petition. But the law requires him to include *all* his debts and *all* his property. Upon reflection it has been realized that the new litigation the Feuersteins have started may be prolonged and expensive if it should go to the point of requiring printing, etc. Mr. Kalb is going to redeem his farm if he can and he can not jeopardise his plans by favoring a creditor against the

**ELMER McCLAIN**

Attorney.

L I M A, O H I O

Honorable George H. Belton    July 24, 1941    2  
provisions of the law. He would like to pay less than the full amounts called for but the creditor will not consent to less than the full sum.

Even if the petition was a proper one to be filed, it is wholly improper as it is. The creditor is The

Yellow Manufacturing Acceptance Corporation. It has filed no petition and would not be bound by any order the court would issue against it under this petition. It is Attorney Mandelker who has filed the petition and he is not a creditor. No litigant may through another ask a favor from a court unless it can also be bound by any order the court might make against it. Whatever any creditor asks for it should ask in its own name.

I am sending a copy of this letter to Attorney Mandelker.

Yours very truly,

Elmer McClain

EMcC:V

cc to Mr. Adolph I. Mandelker  
Attorney at Law  
606 West Wisconsin Avenue  
Milwaukee, Wisconsin

The foregoing clearly shows that the attorney for petitioner received a copy of the petition and had actual knowledge and notice that the same had been filed with the Conciliation Commissioner and was pending before him for the relief requested therein. Instead of filing any formal pleading in opposition to the petition, the attorney for the debtor availed himself of a letter to voice his opposition thereto. Therefore it is evident that when the debtor and his attorney were asked by the District Court as to whether or not they had anything to say with reference to the petition of Yellow Manufacturing Acceptance Corporation, which had been filed with the Conciliation Commissioner, and thereafter filed by the Conciliation Commissioner with the Clerk of the District Court, and which was then pending before the Court both the debtor and his attorney knew of the pendency of the proceedings on said petition as well as the existence of the petition. These facts were presented to the District Court in the statement

of counsel for respondent and the letter of July 24th heretofore referred to was also called to the attention of the Court as were the docket entries of the Clerk.

Petitioner would have the Court believe that the petition of the Yellow Manufacturing Acceptance Corporation descended upon him out of the clear skies and that he had never heard about it before. The record and facts do not substantiate the statements made in petitioner's brief but to the contrary clearly disclose and show that actual notice and knowledge of the petition and the pendency thereof was had by both the debtor and his attorney.

The Circuit Court of Appeals had this to say about the claim of lack of knowledge and notice (127 F. 2d 513):

"Appellants' statement of the facts re his lack of notice is set forth in the margin.\* His contention that he has been denied his property without due process of law, i. e., notice, is frivolous. The letter from debtor's counsel acknowledged receipt of the petition for surrender of the trucks.\*\* He filed no answer or objection thereto. When the matter was called for hearing both debtor and counsel were in court. They refused to consider the petition on the ground that they had no notice of a hearing of said petition. They did not ask for a continuance. No suggestion was made that at a later date they could better present the facts upon which relief was dependent. Nothing further was done in the matter until the order of the District Court was entered October 20. Debtor had ample time after August 5 to inform the court as to the good faith of his promises. Instead, the record continued to date of order, as promises vs. non-action.

It should require no further argument nor citation of authority to show that petitioner is not sincere in his argument that the order of the District Court was made without due process.

**CONCLUSION.**

It is therefore respectfully submitted that petitioner's application for a writ of certiorari should be denied because

1. Section 75 (e) Conferred the power upon the District Court to Make the order involved:
2. The order was made after due process; and
3. The decision of the Circuit Court of Appeals is in accord with the prevailing authorities,

Respectfully submitted,

DAVID CHARNESS,  
Counsel for Respondent  
Yellow Manufacturing Corporation.

ADOLPH I. MANDELKER,  
of Counsel.

Milwaukee, Wis.

September 16, 1942.

17 (3)

## AGRICULTURAL COMPOSITIONS AND EXTENSIONS

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### SECTION 75 OF THE BANKRUPTCY ACT AS AMENDED BY—

PUBLIC 296 OF THE SEVENTY-THIRD CONGRESS  
PUBLIC 60 OF THE SEVENTY-FOURTH CONGRESS  
PUBLIC 384 OF THE SEVENTY-FOURTH CONGRESS  
PUBLIC 439 OF THE SEVENTY-FIFTH CONGRESS  
PUBLIC 696 OF THE SEVENTY-FIFTH CONGRESS  
PUBLIC 423 OF THE SEVENTY-SIXTH CONGRESS

TITLE 11, SECTION 203, UNITED STATES CODE

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(Reprint of Senate Document No. 55, 75th Congress)



PRESENTED BY MR. NYE  
FOR MR. FRAZIER

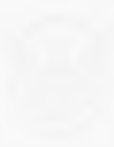
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# AGRICULTURAL COMPOSITIONS AND EXTENSIONS

[PUBLIC—No. 420—72D CONGRESS]

[H. R. 14359]

## AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," as amended by the Acts of February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, and February 11, 1932, be, and it is hereby, amended by adding thereto a new chapter to read as follows:

## "CHAPTER VIII

[As amended by the 73rd, 74th, 75th, and 76th Congresses]

### "PROVISIONS FOR THE RELIEF OF DEBTORS

"SEC. 75. AGRICULTURAL COMPOSITIONS AND EXTENSIONS.—(a) Within thirty days after June 7, 1934, every court of bankruptcy of which the jurisdiction or territory includes a county or counties having an agricultural population (according to the last available United States census) of five hundred or more farmers shall appoint one or more referees to be known as 'conciliation commissioners', one such conciliation commissioner to be appointed for each county having an agricultural population of five hundred or more farmers according to said census: *Provided further,* That where any county in any such district contains a smaller number of farmers according to said census, for the purposes of this paragraph such county shall be included with one or more adjacent counties where the population of the counties so combined includes five hundred or more farmers, according to said census. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office for one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee<sup>1</sup> and in addition is a resident

<sup>1</sup> Sec. 35 of Chandler Act, Public, 696, of the 75th Cong., requires all new referees to be attorneys.

of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

"(b) Upon filing of any petition by a farmer under this section there shall be paid a fee of \$10 to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, a fee of \$25 for each case submitted to him, ~~and when docketed, to be paid out of the Treasury to be paid out of the Treasury when the conciliation commissioner completes the duties assigned to him by the court.~~ A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of \$5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment, and assistance furnished him by other Federal officials, or by any State, county, or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived.

"(c) At any time ~~within 5 years after March 3, 1933,~~ prior to March 4, 1944, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

"(d) After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

"(e) The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

"(f) There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer's estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any supplementary inventory filed by a committee of the creditors.

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims.

"(h) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

"(i) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

"(j) The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer's affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided*, That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24,

of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

“(k) Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured.

“(l) Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided,* That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

“(m) The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

“(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

“In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirma-

tion of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

"(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

"(r) For the purposes of this section, and section 4 (b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy

farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and



earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of

this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

~~"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection(s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges.~~

*"(5) This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Section, as well as to future cases. All cases under this Section that have been dismissed by any conciliation commissioner, referee, or Federal Court because such Court erroneously assumed or held that subsection(s) of section 75 of this Act was unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.*

*"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceeded to liquidate the estate.*







Office - Supreme Court, U. S.

**FILED**

SEP 29 1942

CHARLES ELMORE CROPLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942

**No. 347**

ERNEST NEWTON KALB,

*Petitioner,*

vs.

YELLOW MANUFACTURING ACCEPTANCE  
CORPORATION,

*Respondent.*

On application for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Seventh Circuit.

**REPLY BRIEF.**

ELMER McCLAIN,

Lima, Ohio,

*Counsel for Petitioner.*



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**REPLY BRIEF.**

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**Preliminary Statement.**

All emphasis in this reply brief is supplied unless otherwise stated.

### **The Order of this Reply Brief.**

This reply brief will reply to "Respondent's Brief" in the same order of that brief, using its paging as headings.

#### **"Respondent's Brief" Page 2, Middle of Page.**

The "Respondent's Brief says: "Attached to the petition and constituting a part of the proposal is the following." [Farmer Debtor's proposal under Section 75(a) to (r) to the Y.M.A.C. as a secured creditor.]

#### **REPLY:**

It is probably immaterial but the proposal was **not** attached to or filed with the petition. The petition was filed with the clerk of the District Court and the proposal was filed with the conciliation commissioner at a later date. See "Docket Entries of Conciliation Commissioner," R. 4, entry of July 1, 1941, second paragraph. Also see the "Petition and Brief" for petitioner at page 16, note 2.

#### **"Respondent's Brief" Bottom of Page 2 and Top of Page 3.**

#### **REPLY:**

The record does not show—and it is not true—that the respondent's secured claim "was considered by the conciliation commissioner and after discussion thereon an agreement was made at the hearing approved by the conciliation commissioner and agreed to by the petitioner" that payments would be made to the conciliation commissioner. The creditors' meeting was adjourned without consideration of the proposal because of the petition filed by the real estate mortgage holders to have real estate disclaimed. See "Docket Entries of Conciliation Commissioner." R. 4 to 5, record of creditors' meeting under date of July 1, 1941. Concerning the so-called petition of the Y.M.A.C. which



the docket of the conciliation commissioner seems to show was filed that day (but was not even verified until 16 days later) see the "Petition and Brief" for the petitioner at page 17, note 3.

**"Respondent's Brief" from the First Paragraph on  
Page 3 to the Middle of Page 10.**

REPLY:

These seven pages of matter are lugged into the "Respondent's Brief." None of it appears in the record with the exception of the six lines at the foot of page 9, quoted from the proposal to creditors at the bottom of R. 14 and the 13 lines at the top of page 10 quoted from a paragraph of the appellate court's opinion at R. 33.

It is repeated **that there was no agreement** at the creditors' meeting or at any other time or place that the farmer debtor would pay the respondent anything.

The respondent, like the opinion of the appellate court below, treats the unaccepted proposal to creditors, filed under Section 75(a) to (r), as if it were a contract. It was never considered or acted upon by the creditors—never accepted—never presented to or confirmed by the judge,—all of which are the mandatory requirements of Section 75(g) and (i) before it becomes binding. (The whole of Section 75 is inserted in the "Petition and Brief" for the petitioner at page 14.)

The reason why the proposal was not considered was because the creditors' meeting was indefinitely adjourned due to the mortgage holder's petition to disclaim real estate. The meeting still stands adjourned. See the "Petition and Brief" for the petitioner at page 16, third paragraph at the middle of the page.

Although the matter on pages 3 to 10 of "Respondent's Brief" does not merit attention, **because it is not in the record** (no designation for it having ever been filed), it is perhaps advisable to make the following statements concerning it.

1. It is of **conclusive significance** that the respondent, when it lugged this extraneous matter into its brief, **did not also include two other papers** that were a part of it. these papers were:

- a. A letter dated July 19, 1941, from respondent's counsel to the conciliation commissioner, and
- b. A blank form of proposed "Order to Show Cause."

2. These two papers are here copied in full, exactly as they came to the petitioner's counsel from counsel for the respondent. They follow:

"Law Offices  
ADOLPH I. MANDELKER  
606 W. Wisconsin Ave.  
Milwaukee, Wisconsin

COPY

Phone: Marquette 2024

July 19, 1941

Mr. George H. Belton  
Conciliation Commissioner  
Elkhorn, Wisconsin

Re: Ernest Newton Kalb

Dear Sir:

I have not heard from you to the affect that the above party has made payment on the trucks upon which my client, Yellow Manufacturing Acceptance Corporation,

has a lien and I take it that no such payment has been made.

I believe that the agreement made in your Court on July 1st was of a definite enough nature so as to give you the authority, if you desire, to exercise it to sign the enclosed order which is based upon my petition asking for the same.

I am sending a copy of this letter and the petition to Mr. Kalb and am also sending one to his attorney, each by registered mail, and it is my belief that if you do not hear from either of them, either with payment or a petition asking that you deny my petition, that I am within my rights in asking that the enclosed order be signed.

Please understand that I am not attempting to take upon myself the operation of your Court as a Conciliation Commissioner, but I am merely trying to cut through some of the red tape to protect my client from serious loss in this matter.

I assure you that your consideration of the matter will be very much appreciated.

AIM:eh  
Enclosure

Very truly yours,  
Adolph I. Mandelker"

(b)

"IN THE DISTRICT COURT OF THE UNITED STATES  
For the Eastern District of the  
State of Wisconsin

In the Matter of  
Ernest Newton Kalb,  
Debtor.

#### ORDER TO SHOW CAUSE

At Elkhorn, Wisconsin, in said District on the .....  
day of ....., 1941:

Upon the annexed petition of Adolph I. Mandelker, attorney for Yellow Manufacturing Acceptance Corporation, verified on the ..... day of July, 1941, and filed in this Court, it is

Ordered that Ernest Newton Kalb surrender to Yellow Manufacturing Acceptance Corporation the vehicles described in said petition on or before the ..... day of ....., 1941, and it is further

Ordered that service of this order and the annexed petition upon said Ernest Newton Kalb be had not less than ten (10) days prior to the time set for surrender of the vehicles.

Dated at Elkhorn, Wisconsin, this ..... day of ....., 1941.

.....  
Conciliation Commissioner."

These papers will now be discussed:

(a) The said letter of July 19, which had just been copied refers to an agreement of July 1 as being "of a definite enough nature so as to give you" [the Conciliation Commissioner] "the authority, if you desire, to exercise it, **to sign the enclosed order.**" There had been no agreement whatever. The "enclosed order" was the blank, unsigned, skeleton form headed "Order to Show Cause" which is copied above in full under (b).

This letter further says that the author is not "attempting to take upon myself the operation of your court as a conciliation commissioner, but I am merely trying to **cut through some of the red tape.**" The "red tape" respondent is trying to escape is Section 75(o), which in another case originating in Wisconsin was held by this court to be mandatory upon a state court. *Kalb v. Feuerstein*, (1940), 308 U. S. 433. Section 75(p) makes Section 75(o) equally mandatory upon all other courts.

It will be noted that this letter **does not ask the Conciliation Commissioner to file anything.** It merely asks, and that only by implication, that the Conciliation Commissioner **sign the enclosed order.** No order to show cause was issued. The suggestion that it be issued was ignored.

(b) The blank form headed "Order to Show Cause" is copied above exactly as it was received. Neither the petitioner nor his counsel ever received anything concerning it other than the said letter of July 19 and the enclosed blank form.

Immediately upon receipt of the documents "(a)" and "(b)" and of the proposed "petition" enclosed with it, counsel for the petitioner wrote the conciliation commissioner the letter which is copied at pages 15 to 17 of "Respondent's Brief". That letter vigorously objected to the proposed procedure, saying the conciliation commissioner had no power to issue such an "order," and that the "red tape" referred to by the respondent was the legal provisions enacted to protect the farmer debtor and his property from such an attempt. He was advised that the respondent was asking what this court has decided may not be done. Nothing further was heard of it.

It is very clear that it is not true, as the "Respondent's Brief" says at page 17, that the petitioner "had actual knowledge and notice that the same [the "petition"] had been filed with the conciliation commissioner." The letter from the respondent to the conciliation commissioner did not ask him to file the "petition", it suggested that he issue the "order to show cause". **The Conciliation Commissioner did not issue that or any other order to show cause.**

The petitioner and his counsel never heard anything more about the subject until counsel for the respondent appeared before the Judge of the District Court on Motion Day, August 5, 1941, and without notice or hearing, asked for an order and got it. That is the final order at R. 17 to 18. It was undoubtedly drafted by the respondent and presented to the judge for signature. Its peculiar verbiage is discussed in the "Petition and Brief" of the petitioner at page 33.

**"Respondent's Brief" Bottom of Page 10 to  
Top of Page 11.**

The "Respondent's Brief" correctly assumes:

1. That the appellate court held the bankruptcy court had a **discretion** to order the farmer debtor to surrender his property to the secured creditor, and
2. That it held the order (R. 17 to 18) only effects **possession**.
3. That it held Section 75(e) gives the bankruptcy court power to **change the possession** of the farmer debtor's property from the farmer debtor to a secured creditor—that is to deprive the farmer debtor of his property and force him to surrender it to the mortgage holder.
4. That it held the farmer debtor **failed to keep his promises**.
5. That it held the farmer debtor **tried to change his promises**.
6. That it held the farmer debtor **tried to avoid a hearing**.

**Every one of these holdings by the appellate court is unwarranted.**

1. The District Court has no "discretion" to order the "seizure", "distress", "or other proceedings" under any "lien, chattel mortgage, conditional sale . . . or mortgage" (quoted from Section 75(o)) except as provided in Section 75(o). Not one of the requirements of Section 75(o) was complied with.

2. The order (R. 17 to 18) at R. 18 requires the petitioner **"to surrender and deliver to Yellow Manufacturing Corporation"** his chattels **unconditionally**.

There is **not a word** about **"possession"** in the order.

3. Section 75 (e) does **not** empower the bankruptcy court to take the farmer debtor's property from him and give it to the secured creditor.

To **"control"** the farmer debtor's property **does not** mean to take it away from him.

To **"control"** the farmer debtor's property **does not** mean to give it to another.

If the word **"control"** in Section 75(e) is a **"weazel word"** that gives the bankruptcy court summary power, via **"discretion"** to order the farmer debtor to surrender his property to his secured creditor, then indeed Section 75 as a whole and Section 75(n), (p), and the decisions of this court on Section 75 in particular are all swept away. Section 75 would thus effectively be repealed by judicial legislation.

4. Whether the phrases **"failure to keep the promises,"** **"change the promise"** refer to (a) the proposal to creditors (R. 13 to 15) which was never presented to creditors or considered by them, or (b) to a fictitious **"agreement"** be-

tween the farmer debtor and the secured creditor in some way outside the pending proposal, it is impossible to discover.

But the farmer debtor was never bound by either. The court did not "confirm the proposal" (quoted from Section 75(i)) and no outside agreement was ever made.

5. It is deemed that the phrase "his effort to change the promises" needs no further discussion.

6. It is impossible to discern what is referred to by the phrase "the debtor's effort to avoid the hearing."

a. If it is meant that he tried to avoid a hearing before the conciliation commissioner, the answer is that the conciliation commissioner never set a hearing. Not a word came from the conciliation commissioner on the subject.

b. If it is meant that he tried to avoid a hearing before the bankruptcy court on August 5, 1941, he rightly refused to enter into a hearing on a subject when he had no notice whatever that there was to be such a hearing and did not even know that an application for an order had been filed.

If the Fifth Amendment means anything, it condemns as futile the respondent's attempt to misuse judicial process. It was so held in the authorities and decisions in the discussion of this subject at pages 30 to 32 of the "Petition and Brief" of the petitioner.



**The Cases Cited in "Respondent's Brief"**  
**"Respondent's Brief" Page 12.**

*Continental v. Rock Island* (*Continental v. Chicago, etc.*), (1935), 294 U. S. 648. This case arose under Section 77, the Railroad Debtor Law of 1933, which contained no provision comparable to Section 75(o) or (p). It did have a provision comparable to the general provision in Section 75(n) reposing exclusive jurisdiction over the debtor and the debtor's property. Under this general provision this court held that the bankruptcy court had power to **restrain the mortgage holder** from exercising any control over the debtor's property even though the contract between the debtor and the mortgage holder specifically provided for such control and sale of the security.

The holding was that the **bankruptcy court had discretion** under its general exclusive jurisdiction to hold the security in the hands of its owner **not to surrender it** to the mortgage holder.

**"Respondent's Brief" Page 12.**

*Heffron v. Western Loan* (1936), CCA 9, 84 Fed. (2d) 301. This case involved an **involuntary petition in regular bankruptcy** under the Bankruptcy Act of 1898. No debtor proceeding was involved. **Three years** before adjudication the bankrupt gave a mortgage. The mortgagee sold the security at private sale one day after the involuntary petition was filed. The court held that although the bankruptcy court had power to administer the security, since the sale was held one day after the jurisdiction of

the bankruptcy court attached, yet the sale would not be disturbed as there was no asset in the security for general creditors.

This correct **general bankruptcy** law. The court rightly held that under the Act of 1898 a bankruptcy court had a discretion to administer mortgaged property if there was any excess of value ("equity") for the general creditors or to disclaim it if no such benefit to the creditors existed.

On the contrary the whole purpose of the **farmer debtor law** is that the bankruptcy court shall **retain its jurisdiction over mortgaged security regardless of its inadequacy to meet the debt secured by it**, so that the farmer debtor may eventually **redeem it at its value**, regardless of the amount of the debt.

No such discretion in the bankruptcy court to surrender a farmer debtor's property to a creditor, as claimed by the respondents, exists and not a single citation in its support has ever been put forward by the respondent.

#### **"Respondent's Brief" Page 14.**

*In re Henderson* (1938), CCA 5, 100 F. (2d) 820. This was one of the three decisions of the Fifth Circuit cited by this court in *John Hancock v. Bartels*, 308 U. S. 180, at 181, Note 3, as reasons for granting certiorari. The *Henderson* decision was overruled. It dismissed a farmer debtor case for "lack of good faith." A subsidiary point, the one on which respondent relies, was that the farmer debtor's petition was dismissed before the expiration of three months from the creditors' meeting under Section 75(a) to (r), without notice. No time had been fixed for

the filing of an application for confirmation of the proposal. In view of General Order No. 50 (4) directing the conciliation commissioner to fix a time "not later than three months" the dismissal was premature on any ground. The strongest expression of the First Circuit Court on this subject was that "**It may be questioned** whether or not" the farmer debtor could object to such procedure because he must at all times keep track of all papers filed in the office of the clerk of the district court by either the conciliation commissioner or by the supervising conciliation commissioner! But this theory of sidestepping the Fifth Amendment is overwhelmingly repudiated by the courts. See pages 30 to 32 of the "Petition and Brief" of the petitioner filed in this case which covers both farmer debtor and regular bankruptcy cases.

#### **"Respondent's Brief" Page 14.**

*Massey v. Farmers, etc., Bank* (1938), CCA 4, 94 Fed. (2d) 526. This was another case which dismissed a farmer debtor proceeding for "lack of good faith" and was overruled by *John Hancock v. Bartels*, 308 U. S. 180. The decision did not rest upon the assumption that, as stated by "Respondent's Brief," "in agricultural composition proceedings a debtor is bound to take notice of the filing of the conciliation commissioner's report recommending dismissal." On that subject the opinion says:

"Counsel had an opportunity to be heard and an opinion was filed on December 17, 1937, in which the facts were discussed on their merits and the absence of good faith was noted that was as essential to the maintenance of the original as of the amended petition. The debtor was not denied an opportunity for a fair hearing."

The court also criticized the bankruptcy court for not giving notice to the farmer debtor of the filing of the Conciliation Commissioner's report, saying: "It would be proper practice" to direct the farmer debtor to show cause why his petition should not be dismissed on the basis of the report of the conciliation commissioner that there was 'lack of good faith'."

This is the last of the only authorities cited by the respondent. The lack of a single citation of authority in support of the final order of October 20, 1941, at R. 17 to 18, is decisive.

Respectfully submitted,

ELMER McCLAIN,

*Counsel for the Petitioner,  
Ernest Newton Kalb.*

Lima, Ohio

September 21, 1942

